(4)

Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

No. 00-131

In The

Supreme Court of the United States

K.D.M., a minor child, by and through his father and next friend, W.J.M.,

Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE, VERMONTERS FOR BETTER EDUCATION, INC., DR. BLANE NASVESCHUK, AND CYNTHIA BAGLEY IN SUPPORT OF THE PETITIONER

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THE EIGHTH CIRCUIT'S DECISION IN *PETER v. WEDL* 6

A. FREE EXERCISE 6

B. EQUAL PROTECTION 9

II. RESTRICTIVE STATE CONSTITUTIONAL PROVISIONS CANNOT BE PERMITTED TO DISCRIMINATE AGAINST PARENTS' CHOICE OF RELIGIOUS SCHOOLS FOR THEIR CHILDREN 11

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 3

Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999).....1, 2, 5, 7

Board of Education v. Allen, 392 U.S. 236 (1968) 17

Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994).....5, 9

Chittenden Town School Dist. v. Vermont Dep't of Ed., 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999) 1, 2, 18

Chicago v. Morales, 527 U.S. 41 (1999)..... 12

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 5, 7, 8, 16

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 10

Donahoe v. Richards, 38 Me. 376 (1854)..... 14

Employment Division of Oregon v. Smith, 494 U.S. 872 (1990).....5, 6

Everson v. Board of Education, 330 U.S. 1 (1947) ...16, 17

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) 5, 9

Honohan v. Holt, 17 Ohio Misc. 57 (Ct. Common Pleas 1968)..... 17

Jackson v. Benson, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998)..... 1

KDM v. Reedsport School District, 196 F.3d 1046 (9th Cir. 1999) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 120 S. Ct. 42 (1999).....1, 13

Luetkemeyer v. Kaufman, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) 10

McDaniel v. Paty, 435 U.S. 618 (1978).....5, 6

Mitchell v. Helms, 120 S. Ct. 2530 (2000).....3, 12, 13

Pierce v. Society of Sisters, 208 U.S. 510 (1925)..... 16

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 4, 6, 8, 9, 18

Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 120 S. Ct. 329 (1999).....5, 7, 8, 9

Sherbert v. Verner, 374 U.S. 398 (1963) 6

Widmar v. Vincent, 454 U.S. 263 (1981)..... 11

Witters v. Washington Commission for the Blind, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989) 18

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 18

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 3

Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992).....10, 12

CONSTITUTIONAL PROVISIONS

Oregon Const. art. I, § 5..... 10, 11, 12, 15

TABLE OF AUTHORITIES – Continued

Page

CODES AND STATUTES

20 U.S.C. §§ 1400-1485 (1998) 3

OR. ADMIN. R. 581-015-0166 (1995) 11

MISCELLANEOUS PUBLICATIONS

Charles Glenn, Jr., The Myth of the Common School (1998) 13

David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening of the West*, 36 HARV. EDUC. REV. 447 (1966) 15

David Tyack, "The Perils of Pluralism: The Background of The Pierce Case," AMER. HIST. REV. 74 (1968) 16

G. Alan Tarr, "Church and State in the States," 64 WASH. L. REV. 73 (1989) 17, 18

Lloyd P. Jorgenson, The State and the Non-Public School 1825-1925 (1987) 13, 15, 16

Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL. 657 (1998) 12, 14

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals and organizations strongly committed to education reform and particularly to expanding parental choice in education. The legal issues raised in the instant case directly implicate *amici*'s individual and institutional concerns.

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute for Justice has defended or is presently defending the constitutionality of programs in Arizona, Florida, Illinois, Ohio, and Wisconsin that give parents greater freedom to send their children to the schools of their choice. In addition, the Institute spearheaded legal efforts to expand parental choice programs in Maine and Vermont that exclude religious schools from the choices parents can make. To date, this Court has denied petitions for certiorari in cases involving the Institute for Justice from Arizona,[2] Wisconsin,[3] Maine,[4] and Vermont.[5]

---

[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in whole or in part and that no person or entities other than *amici*, their members, and their counsel made a monetary contribution to the preparation and submission of the brief.

[2] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 120 S. Ct. 42 (1999).

[3] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998).

[4] *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999).

[5] *Chittenden Town School Dist. v. Vermont Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999).

Vermonters for Better Education, Inc. ("VBE") is a nonprofit organization dedicated to improving educational options for all children in the state of Vermont. Based in Vermont, one of only two states that offers local school districts the option of providing all resident high school students tuition to attend the private or public schools of their choice in lieu of operating district public schools, VBE strongly supports efforts to allow parents to choose religious as well as nonreligious schools for their children's education.

Dr. Blane Nasveschuk is the parent of a son attending Mount St. Joseph's Academy in Rutland, Vermont, one of two Catholic high schools in the state. As a resident of the Rutland Town School District, which opts to pay tuition for its high school students to attend the private or public schools of their choice rather than operate its own public high school, Dr. Nasveschuk is unable to have tuition paid on his son's behalf because of Vermont's exclusion of religious schools from the "tuitioning" program, an exclusion mandated by the Vermont Supreme Court's decision in *Chittenden Town School District v. Vermont Dep't of Education*, 738 A.2d 539, *cert. denied*, 120 S. Ct. 626 (1999).

Cynthia Bagley is a parent of two sons, one of whom attended Cheverus High School in Portland, Maine, one of three Catholic high schools in the state, and the other of whom cannot attend Cheverus for financial reasons. As a resident of Raymond Township, which opts to pay tuition for its high school students to attend the private or public schools of their choice rather than operate its own public high school, Mrs. Bagley was and is unable to have tuition paid on her sons' behalves because of Maine's exclusion of religious schools from the "tuitioning" program, an exclusion upheld by the Maine Supreme Judicial Court in *Bagley v. Raymond School Dep't*, 728 A.2d 127, *cert. denied*, 120 S. Ct. 364 (1999).

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the Title I program that was the subject of this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), and the Chapter 2 program that was the subject of this Court's decision this past term in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), the Individuals with Disabilities Education Act ("IDEA"),[6] the federal program at issue in this case, provides federal aid to local school districts to administer educational programs targeted to a specific population of individual students, those in need of special educational services. This Court's decision involving the IDEA, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), made clear that the Establishment Clause permits IDEA services, such as those at issue in this case, to be delivered by the local school districts on the premises of private religious schools such as the school involved in this case. The decision of the Ninth Circuit below, however, permits the more restrictive state constitution of Oregon to trump the petitioner's free exercise of religion and equal protection rights by denying to petitioner the on-site provision of special education services he would receive if he attended a secular private school.

Amici share with petitioner an interest in seeing this erroneous interpretation of the Free Exercise and Equal Protection Clauses reversed. *Amici* promote, and the individual *amici* would like to participate in, programs that expand the range of educational options available to children, particularly low-income children for whom private education is otherwise financially unavailable. These programs operate through publically-funded tuition and scholarships, as well as tax credits for educational expenses and donations to scholarship funds. To maximize their effectiveness, these programs must include the widest possible variety of educational options. The Vermont Supreme Court's novel interpretation of its state

---

[6] 20 U.S.C. §§ 1400-1485 (1998).

constitution's religion provision and erroneous interpretation of the Federal Constitution's free exercise guarantee has left families, like that of *amicus* Nasveschuk, wishing to choose religious schools unable to participate in Vermont's tuitioning program. Similarly, the Maine Supreme Court's erroneous interpretation of the Establishment and Free Exercise Clauses have left families, like that of *amicus* Bagley, similarly unable to participate in Maine's tuitioning program. If erroneous decisions such as these and the case below are permitted to stand, the effectiveness of school choice programs that meet all the prerequisites of the Establishment Clause can be undercut by state supreme courts implementing state constitutional provisions conceived in religious bigotry.

The fundamental flaw in the Ninth Circuit's decision below is that it took the "substantial burden" test from this Court's pre-*Employment Division of Oregon v. Smith*[7] Free Exercise Clause jurisprudence applicable to distinctions facially neutral with respect to religion and applied it to a classification that is *not* religiously-neutral on its face. Because in the case below the discrimination against those selecting a religious school meant that the petitioner, who is blind and suffers from cerebral palsy, "merely" had to be taken down the street to a fire hall to receive the special education services to which he is entitled (and which he would have received on-site had he attended a nonreligious private school), the Court found no Free Exercise or Equal Protection violation, thereby creating a *de minimis* exception for overt discrimination based on religion.

The Ninth Circuit's holding is in direct conflict with an IDEA decision of the Eighth Circuit, *Peter v. Wedl*, 155 F.3d 992 (1998), which held that Minnesota could not deny on-site IDEA services without violating the Free Exercise, Equal Protection, and Free Speech Clauses. The Ninth Circuit's use of the substantial burden test in a

---

[7] 494 U.S. 872 (1990).

nonfacially-neutral situation also conflicts with decisions of the Third and Sixth Circuits, *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), and *Hartmann v. Stone*, 68 F.3d 973 (1995), although these cases do not involve the IDEA. The First Circuit, however, in *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 120 S. Ct. 329 (1999), also has erroneously applied the substantial burden test to a case involving a religious classification on its face.[8] Thus, the circuit courts are split three-to-two on whether to apply the substantial burden test to distinctions that are not religiously-neutral on their face.

In failing to apply the correct test to a facially discriminatory classification, the Ninth Circuit has failed to properly follow this Court's decisions interpreting the Free Exercise Clause that apply strict scrutiny to legislative actions based on religion, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). See also *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990). If permitted to stand, the Ninth Circuit's decision below will undercut the IDEA's religious neutrality, as well as the neutrality of other similar programs like Title I. Moreover, it will continue to permit states to discriminate against those people who make religious choices for the education of their children, under the guise of implementing state constitutional provisions more restrictive than the Establishment Clause but which in actuality infringe on free exercise rights.

---

[8] *Strout*, a non-IDEA case, involved the same Maine tuitioning program addressed by the Maine Supreme Judicial Court in *Bagley*.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THE EIGHTH CIRCUIT'S DECISION IN *PETER v. WEDL.*

A. FREE EXERCISE

Prior to this Court's decision in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), this Court employed a balancing test in evaluating claims that laws of general applicability, religiously-neutral on their face, infringed upon the religious Free Exercise rights of particular individuals. This test asked whether the challenged legal requirement placed a substantial burden on the observation of a central tenet of religious belief or practice. If so, then the governmental action had to be justified by a compelling governmental interest to survive scrutiny. *Sherbert v. Verner*, 374 U.S. 398 (1963). The test essentially balanced the harm to the individual against the interests served by the government's rule or law, and quite naturally applied only where the individual could show that the burden was significant or substantial. The test, however, applied only where the governmental action was religiously neutral; the Court did not apply it to those infrequent cases where a statute on its face was not religiously neutral, such as *McDaniel v. Paty*, 435 U.S. 618 (1978), which addressed Tennessee's disqualification of clergy from service in the state legislature and constitutional conventions.

In *Smith*, this Court jettisoned the substantial burden balancing test for religiously-neutral laws, holding that where such laws have the effect of burdening religiously-motivated activity there is no need to justify them with a compelling governmental interest. *Smith* did not, however, in any way eliminate the strict scrutiny test that applied, and continues to apply, to governmental action that is not religiously-neutral, either on its face or by

intent. This Court's decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), made this clear. Rejecting decisions from the trial court and Eleventh Circuit that were premised on the substantial burden test applicable to religiously-neutral actions, this Court reversed unanimously, finding that the actions of the government were not intended to be religiously neutral, and that strict scrutiny therefore applied.

The Ninth Circuit below misread *Lukumi* and applied the improper substantial burden test, which allowed the Court to determine that requiring KDM to be taken down the street to the fire hall to obtain special education services did not constitute a substantial burden on his right to attend a religious school. Despite its recognition that the regulation in question necessitated treating KDM differently than similarly-situated children in public schools and nonsectarian private schools, and thus was not religiously-neutral, the Court refused to apply *Lukumi* based on its belief that *Lukumi* only applies to situations where government acts with "the object or purpose . . . of suppression of religion or religious conduct." *KDM*, 196 F.3d 1046, 1050 (*quoting Lukumi*, 508 U.S. 520, 533).

The *KDM* Court agreed with the First Circuit's decision in *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 120 S. Ct. 329 (1999), that *Lukumi* only mandates strict scrutiny where the statute that discriminates against religion on its face is motivated by a substantial animus. While it is clear in *Strout* (and its state court analog *Bagley*) that the exclusion of religious schools from those parents can choose under Maine's tuitioning system occurred due to a mistaken belief that this was necessary to comply with the Establishment Clause, *amici* do not believe that a similar lack of animus can be said to apply to Oregon's

regulation.[9] Moreover, both *Strout* and *KDM* misunderstood this Court's use of the evidence of substantial animus in *Lukumi*: it went to show that the statutes involved were not religiously-neutral, despite arguments to the contrary. In both *Strout* and *KDM*, there is no question that the statutes are religiously neutral. Only children in religious schools cannot receive tuition in *Strout* and on-site IDEA services in *KDM*.[10]

In so (mis)reading *Lukumi*, the Ninth and First Circuits have placed themselves in conflict with the Eighth Circuit's decision in *Peter v. Wedl*, 155 F.3d 992 (1998). *Peter* involved a nearly identical fact pattern, in which a state regulation forbade the provision of IDEA services on the premises of religious schools. Because of the nature of their disabilities, however, the children in *Peter* required full-time services in the classroom, and the state's regulation put them to a harder choice than KDM faced. They had either to forego the services entirely and remain in their religious schools or forego attending their religious schools and receive the services in a non-religious school. The Ninth Circuit seized upon this factual difference and elevated it to a legal distinction by declaring the burden on KDM to be insubstantial. The *Peter* decision, however, is in no way premised on the idea that

---

[9] See part II of this Argument, *infra*.

[10] *Amici* emphasize in this regard that it is the line-drawing on the basis of religion that is the problem. If the Minnesota rule in *Peter* and the Oregon rule in *KDM* precluded on-site IDEA services in all private schools, then the line drawn is based on a public-private distinction that does not implicate the First Amendment. Where, however, the line is drawn on a religious basis, or a facially neutral line is chosen because of its effects on the basis of religion (i.e., due to religious animus), then strict scrutiny is required.

the burden placed on the free exercise rights of the plaintiffs there were "substantial" enough to warrant the protection of the First Amendment. See *Peter*, 155 F.3d 992.

While not IDEA cases, the Third and Sixth Circuits have resolved cases consistent with *Peter* and in conflict with *KDM* and *Strout*. In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (1994), a town erected a gate in a town park to eliminate the shortest route to a property used for religious meetings. The Third Circuit refused to apply the substantial burden test used in *KDM* because it recognized that it was developed "to balance the tension between religious rights and valid governmental goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." *Brown*, 35 F.3d at 850. Since the burden imposed by the government's action in that case was intentionally based on religion, the burden it imposed was not incidental and strict scrutiny applied. Similarly, in *Hartmann v. Stone*, 68 F.3d 973 (1995), the Sixth Circuit did not use the substantial burden test but rather applied strict scrutiny in invalidating a facially discriminatory Army regulation that forbade day-care providers on an army base from engaging in religious activities. The Court noted that the Army regulation was not religiously-neutral on its face, and that therefore strict scrutiny applied.

B. EQUAL PROTECTION

In *Peter*, the Eighth Circuit held that the Minnesota regulation precluding on-site IDEA services also violated the Equal Protection Clause as a classification based on religion that could not be justified under the *strict scrutiny* standard. In *KDM*, the Ninth Circuit held that the virtually identical Oregon regulation did *not* violate the Equal Protection Clause because the classification was justified under the *rational basis* standard as a legitimate

interpretation of Article I, § 5 of the Oregon Constitution. See *KDM*, 196 F.3d at 1052. One of these Circuits must be wrong; *amici* submit that it is clearly the Ninth.

Despite having clearly found that the Oregon regulation "discriminates" on the basis of religion in its treatment of KDM's Free Exercise claim, *KDM*, 196 F.3d at 1050, in addressing the Equal Protection claim, the *KDM* court identified the classification at issue as being the class of parochial school students and asserted without support that they are not a suspect class and thus only protected by the rational basis test.[11] The court referenced the parties' stipulation that the State of Oregon interprets Article I, § 5 of its constitution to require the provision of special education services in a religiously-neutral setting, and concluded that the regulation rationally furthered the State's legitimate interest in its religious separation requirement, which clearly exceeded any such separation required by the federal Constitution.[12]

---

[11] Although the Ninth Circuit directed readers to *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), see *KDM*, 196 F.3d at 1052, that case has nothing to do with religion or parochial school students, although it does state that the unsurprising proposition that classifications based on race, *religion*, and ethnicity are subject to strict scrutiny. See *Dukes*, 427 U.S. at 303.

[12] The Court supported its decision by noting that its holding in *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992), that the Free Exercise Clause does not create a fundamental right to on-site IDEA services, is still the law of the Ninth Circuit despite this Court's overruling of *Zobrest*'s Establishment Clause holding. The Court also cited to *Luetkemeyer v. Kaufman*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), holding that there was no equal protection right to transportation to religious schools. *Amici* note that these decisions are inapposite to the issue at hand, and reiterate their view that the Equal Protection Clause only comes into play when the State has already made a decision to include students at private schools within a benefit program. Once it has done so,

The Equal Protection holding of *KDM* both conflicts with another circuit's holding on an identical issue and fails to conform to this Court's application of strict scrutiny of religious classifications. Moreover, this Court has refused to allow more restrictive state constitutional provisions to compromise the Free Exercise Clause in *Widmar v. Vincent*, 454 U.S. 263 (1981), and a similar result must obtain under the Equal Protection Clause.[13]

II. RESTRICTIVE STATE CONSTITUTIONAL PROVISIONS CANNOT BE PERMITTED TO DISCRIMINATE AGAINST PARENTS' CHOICE OF RELIGIOUS SCHOOLS FOR THEIR CHILDREN

The petition filed by K.D.M. provides an otherwise thorough statement of the facts of the case that *amici* wish to supplement in only one area. The parties stipulated that the Oregon Administrative Rule at issue in this case (OR. ADMIN. R. 581-015-0166 (1995)), which states that "special education and related services shall be provided in a religiously-neutral setting," implements the State of Oregon's interpretation of Article I, § 5 of its state constitution.[14] Article I, § 5 reads as follows: "No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any

---

it discriminates on the basis of religion to exclude from receiving benefits only those students who have chosen religious schools.

[13] An important reason for a consistent outcome under the two clauses is that many participants in school choice programs choose religious schools for non-religious reasons, but still should have an opportunity to challenge successfully the discriminatory denial of benefits based upon the exclusion of religious schools.

[14] *KDM v. Reedsport School District*, 196 F.3d 1046, 1052 (9th Cir. 1999).

money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly." Thus, while it is clear post-*Zobrest* that neither the federal Establishment Clause nor the IDEA prohibits the provision of the special education services KDM needs on site at his religious school, Oregon interprets its Constitution as forbidding such on-site delivery as the "draw[ing] of money from the Treasury for the benefit of [a] religious . . . institution."

Article I, § 5 is, of course, a precursor of the state Blaine Amendments, which are found in the constitutions of 29 states.[15] Several members of this Court and the Arizona Supreme Court have recently recognized that the Blaine Amendment (and, *amici* would add, its progeny in the state constitutions), requiring the exclusion of pervasively sectarian schools from otherwise permissible aid programs, was a proposal "born of bigotry, [that] should be buried now."[16] The First Amendment

---

[15] Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL. 657 (1998).

[16] *Mitchell v. Helms*, 120 S. Ct. 2530, 2551-52 (2000) (plurality op. of Thomas, J. at 30-31). Justice Thomas, joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, noted that:

> Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. *Cf. Chicago v. Morales*, 527 U.S. 41, 53-54, n. 20 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," *post*, at 1, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the

demands that the state Blaine Amendments be interred with it.[17]

Oregon in particular shares in the "shameful pedigree" of the Blaine Amendments, of which Justice Thomas wrote in *Mitchell v. Helms*.[18] Public schools in the United States arose from the "common school" movement that began in Massachusetts in the early 1800's.[19] As one

---

constitution to bar any aid to sectarian institutions. Consideration of the Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for Catholic. See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

In *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz.), *cert. denied*, 120 S. Ct. 42 (1999), the Arizona Supreme Court concluded that "The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.' " (Citations omitted.) Despite the similarity of language between its state Blaine Amendment and the federal original, the Court refused to give its constitutional language a more restrictive interpretation than the Establishment Clause because "we would be hard pressed to divorce the amendment's language from the invidious intent that prompted it." *Id.*

[17] More precisely, what must be buried is the interpretation of the state religion provisions to restrict the participation of religious providers in programs meeting the First and Fourteenth Amendments' command of religious neutrality in parental choice programs.

[18] See note 16, *supra*.

[19] See, e.g., Charles Glenn, Jr., The Myth of the Common School (1988); Lloyd P. Jorgenson, The State and the Non-Public School 1825-1925 (1987).

legal commentator has noted, "The common-school movement promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of non-believers."[20] Moreover, "[t]he common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority."[21] Bible reading was an essential component of the supposedly "nonsectarian" common schools, but only the Protestant King James Bible was allowed.[22]

---

[20] Viteritti, *supra* note 15, at 666.

[21] *Id.* at 668.

[22] See, e.g., *Donahoe v. Richards*, 38 Me. 376 (1854), in which the Supreme Judicial Court of Maine upheld the expulsion of a Catholic girl who wanted to read the Catholic Douay Bible and refused to read the Protestant Bible. In the course of its opinion, the Court unforgettably expressed the acculturation rationale for the public schools:

> Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen.

38 Me. at 413.

The public schools in Oregon similarly received their impetus from the Protestant clergy.[23] Article I, § 5 of the Oregon Constitution dates from the original 1859 Constitution, and accomplished a primary objective of the Know-Nothing movement of the 1850's – the defunding of any Catholic alternatives to the nondenominational Protestant public schools.[24] Article I, § 5 contains language similar to the Blaine Amendment and was intended to ensure that no aid similar to that going to the nondenominational Protestant public schools went to private religious schools.[25] Oregon, however, ultimately took the public school crusade one step further, when in 1922 Oregon approved an initiative requiring that all children between the ages of eight and sixteen attend

---

[23] See David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening of the West*, 36 HARV. EDUC. REV. 447 (1966). This case study of Oregon in the mid-1800's shows the role of the clergy in the development of the common schools. See also Jorgenson, *supra* note 19, at 52-54.

[24] Professor Jorgenson has concluded that:

> By the time of the Civil War the School Question, which had been debated so heatedly for two decades, was rapidly moving toward an answer. The decision had been foreshadowed by the position taken by the more militant Protestants in the 1840's. The basic elements of the decision were that public funds were not to be allowed for sectarian schools and that Bible reading in the King James version in the public schools was to be encouraged and, if possible, required.

Jorgenson, *supra* note 19 , at 110.

[25] Although no doubt the great majority of private religious schools were Catholic, even in Oregon the Lutherans and Seventh Day Adventists had their own schools. Jorgenson, *supra* note 19, at 210.

public schools. This initiative was backed by the Ku Klux Klan[26] and the Scottish Rite Masons, and effectively outlawed private schools.[27] Two private schools, one of them religious, sued, resulting in this Court's decision in *Pierce v. Society of Sisters*, 208 U.S. 510 (1925), finding that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 208 U.S. at 534-35. This Court declared, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for further obligations." *Id.* at 535.

This, then, is the historical context behind the language in many state constitutions that seek to exclude aid to religious schools. The statement with which this Court opened its opinion in *Lukumi*, "The principle that government may not enact laws that suppress religious belief or principle is so well understood that few violations are recorded in our opinions," 508 U.S. at 523, while literally correct in stating this Court has rarely found such violations, is perhaps naïve in ignoring the tremendous legacy left in state constitutions by the anti-Catholic bigotry of the Nineteenth Century. Despite this Court's warning in its first Establishment Clause decision of the modern era, *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), that

---

[26] It bears remembering that the Ku Klux Klan believed in the inherent inferiority of Catholics and Jews, as well as blacks. See, e.g., David B. Tyack, "The Perils of Pluralism: The Background of the Pierce Case," AMER. HIST. REV. 74, 79-80 (1968).

[27] Jorgenson, *supra* note 19, at 205-15.

"the First Amendment . . . requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions, than it is to be used to favor them," and its intimation that it would violate the Free Exercise Clause to have excluded religious school students from the transportation subsidies at issue in that case, many state courts have routinely interpreted their constitutions (as Oregon did here) to deny equal public benefits to people choosing religious schools.

In case after case where this Court has upheld the participation of families or individuals choosing religious options against Establishment Clause challenge, state courts have denied participation under their state constitutions. For example, although this Court approved transportation subsidies in *Everson*, Alaska, Delaware, Hawaii, Idaho, Oklahoma, and Washington deny such subsidies to religious school students.[28] Although this Court approved the provision of textbooks to religious school students as well as all other students in *Board of Education v. Allen*, 392 U.S. 236 (1968), California, Massachusetts, Michigan, Missouri, Nebraska, Oregon, and South Dakota

---

[28] G. Alan Tarr, "Church and State in the States," 64 WASH. L. REV. 73, 98-99 note 136 (1989). A number of other state supreme court decisions excluding religious school students from transportation programs were nullified by state constitutional amendments. *Honohan v. Holt*, 17 Ohio Misc. 57, 244 N.E.2d 537 (Ct. Common Pleas 1968), by way of contrast, took *Everson*'s warning seriously, holding that to have excluded parochial school students from transportation subsidies otherwise available to all would violate the Free Exercise Clause.

deny textbooks to religious school students.[29] And after this Court unanimously upheld the right under the Establishment Clause of a college student to use state and federal money to attend a religious college in order to pursue a religious vocation in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), the Washington Supreme Court held on remand that the state constitution forbade it in *Witters v. Washington Commission for the Blind*, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989).[30]

Cumulatively, these decisions stand as a massive barrier to the rights of religious people to the free exercise of their religious beliefs and the equal protection of the laws. In each and every instance, the denial of those rights occurs through the enforcement of provisions that address religion on their face and that cannot be characterized as religiously neutral. Moreover, history demonstrates that many, if not most, of the provisions have their origins in the pervasive anti-Catholic bigotry of the 1800's.[31] While this anti-Catholicism has largely waned in

---

[29] Tarr, *supra* note 28. As with transportation subsidies, several other state supreme courts that excluded religious school students from textbook programs were overruled by constitutional amendments.

[30] Of course, both *KDM* and *Peter* involve state special education regulations purporting to forbid what this Court upheld under the Establishment Clause, namely, the provision of on-site special education services at religious schools.

[31] The Vermont Supreme Court's reinterpretation of the religion provision of its constitution in *Chittenden*, a provision originally aimed at preventing the then-common practice of government agencies collecting the tithes that church members owed their churches, to forbid the collection of education taxes for use by families selecting a religious school for their children, demonstrates that pre-Blaine Amendment era provisions can also be used as engines for religious discrimination. Of course, at the time it was adopted, the Vermont constitution also limited

the present day, it has been replaced in substantial measure by a secular perspective uncomfortable with and sometimes tacitly hostile to *all* religion and religious expression.[32] *Amici* wholeheartedly endorse the approach of Judge Kleinfeld, dissenting in the case below:

> The Free Exercise Clause prohibits government anticlericalism as vigorously as the Establishment Clause prohibits government from preferring a particular religion. . . . The Establishment Clause and the Free Exercise Clause are not in tension, as though one said people can practice their religion, and the other said "but not in public." The Free Exercise and Establishment Clauses complement one another, both advancing the purpose of freedom of religion. One guarantees individuals the right to freely exercise their religion, the other assures that this free exercise will be unburdened by government preference for a different religion. Americans are entitled to a government that does not discriminate against them because of their religion, even with burdens that those who do not bear them see as merely a slight inconvenience.

KDM, 196 F.3d at 1057 (J. Kleinfeld, dissenting) (footnote omitted).

---

its protections to members of the "Protestant" religion, and excluded Catholics from public office.

[32] Unfortunately, this Court's efforts to rid the public schools of their lingering religious biases and activities under the First Amendment's command of religious neutrality are often misunderstood to mean that it is permissible to burden religious exercise in the interests of ensuring separation of church and state.

CONCLUSION

The decision below is inconsistent with this Court's relevant precedents and with other circuit court decisions that correctly apply those precedents. The Ninth Circuit has mistakenly joined the First in applying a balancing test to a free exercise of religion question involving a regulation that is on its face not religiously neutral, and has mistakenly applied rational basis scrutiny to an equal protection claim involving on its face the suspect category of religion. Moreover, in finding a rational basis for discrimination based on religion, the Ninth Circuit has permitted a state constitutional provision's interpretation to serve as a legitimate state interest, despite that interpretation's result of religious discrimination. If parental choice programs are to reach their full potential as engines for educational reform and greater educational opportunities for all, the erroneous approaches of the Ninth Circuit must be overruled. Accordingly, *amici* urge this Court to grant KDM's petition for certiorari.

Respectfully submitted,

WILLIAM H. MELLOR
CLINK BOLICK*
RICHARD D. KOMER
Institute for Justice
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 955-1300
**Counsel of Record*